(15)

No. 132, ORIGINAL

IN THE

Supreme Court of the United States

STATE OF ALABAMA, STATE OF FLORIDA, STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA, AND THE SOUTHEAST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT COMMISSION,

Plaintiffs,

v.

STATE OF NORTH CAROLINA,

Defendant.

On Motion for Leave to File Bill of Complaint

PETITIONERS' REPLY BRIEF

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STATUTE

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PETITIONERS' REPLY BRIEF

In this original action, four sovereign States seek enforcement of *their* contract with the State of North Carolina. That contract is an interstate compact, the Southeast Interstate Low-Level Radioactive Waste Management Compact, that was enacted into federal law by the Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act ("Compact"). Pub. L. No. 99-240, 99 Stat. 1859 (1986). Disparaging the sovereign acts that both created and seek to enforce the legal obligations at issue, North Carolina's principal argument in opposition is that this case falls outside the Court's exclusive original jurisdiction because the plaintiff States are nominal parties without a direct interest in this action. This argument is patently wrong.

The plaintiff States are parties to a contract with North Carolina with a direct interest in the enforcement of the legal obligations created therein. The Southeast Interstate Low-Level Radioactive Waste Management Commission ("Commission") is purely a creature of the Compact that established it and the State representatives that control it. North Carolina's legal duty to its contract partners is the source of its obligation to pay damages to the Commission. This Court has often recognized that states have a direct and significant interest in the enforcement of interstate compacts.

Substantial issues of federal law are at stake here. The contract at issue is an interstate compact and a federal law embodying Congress' express determination that states bear primary responsibility for disposal of low-level radioactive waste and should form interstate compacts to develop disposal facilities and promote public health and safety. See Motion for Leave to File Bill of Complaint 2 ("Mot."). Moreover, this dispute among the States cannot be heard in any other forum. It concerns questions of federal law, specifically interstate compact interpretation, where this Court has the strongest "claim to . . . expertise." *Ohio* v.

Wyandotte Chems. Corp., 401 U.S. 493, 505 (1971). This Court should exercise its exclusive original jurisdiction.

1. The Plaintiff States Are Not Nominal Parties. Plaintiffs have no quarrel with the principle that a state cannot invoke original jurisdiction "'as a nominal party in order to forward the claims of individual citizens.'" *Kansas* v. *Colorado*, 533 U.S. 1, 8 (2001). That principal, however, has no application where, as here, four States seek to enforce a contract, an interstate compact, to which they are parties. See, *e.g.*, Bill of Complaint 11 ("Count I – Violation of Member States' Rights Under the Compact"); *id.* at 12 ("Count II – Breach of Contract"). This Court has routinely exercised its original jurisdiction to interpret and enforce such interstate compacts. See, *e.g.*, *Kansas* v. *Colorado*, 533 U.S. 1 (2001); *Nebraska* v. *Iowa*, 406 U.S. 117 (1972). "There is no doubt that this Court's jurisdiction to resolve controversies between two States . . . extends to a suit by one State to enforce its compact with another State or *to declare rights under a compact*." *Texas* v. *New Mexico*, 462 U.S. 554, 567 (1983) (emphasis supplied) (citing, *inter alia*, *Virginia* v. *West Virginia*, 206 U.S. 290, 317-19 (1907)). A state plainly has a direct interest in enforcing its rights under a contract and an interstate compact. Our research has disclosed no case in which the Court has dismissed a state's complaint against another state seeking to enforce an interstate compact.

North Carolina's contention that the plaintiff States are simply cat's paws for the Commission, lacking any direct interest in North Carolina's breach of the Compact, is baseless. North Carolina's failure to develop, license, and construct a disposal site pursuant to its contractual obligations injured all member States. North Carolina accepted the benefits of Compact membership (disposing of its waste at the South Carolina facility) and millions of dollars to provide the next disposal site, and then breached the Compact. As a result, the member States lost invaluable time, substantial funds (approximately $80 million that could have been

invested to produce a disposal site in another member State), and access to a disposal facility. In seeking to enforce the Compact, the plaintiff States therefore are directly vindicating their own interests and redressing an injury that "affects the general population of [their] State[s] in a substantial way." *Maryland* v. *Louisiana*, 451 U.S. 725, 737 (1981).

Moreover, two States initiated the enforcement proceeding underlying this original action (by filing the sanctions complaint pursuant to the Compact), and four States filed this original action. Nothing in this record indicates that the States did so as pawns of the Commission.[1]

Nevertheless, North Carolina contends, the plaintiff States are only nominal parties because they have no direct interest in the $80 million owed to the Commission and "none of the funds at issue were ever public funds of the plaintiff states." Opp. 13. This is beside the point, see *supra*, and wrong. Leaving aside each State's initial $25,000 contribution to the Commission, the Compact also provides that:

> [e]ach state hosting a regional disposal facility shall annually *levy special fees or surcharges* on all users of such facility . . . the total of which . . . b. *Shall represent*

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[1] North Carolina's citations reveal how far afield its argument is. *See Kansas* v. *Colorado*, 533 U.S. at 8-9 (*rejecting* the argument that Kansas was a nominal party and that farmers were the real parties in interest, explaining that "[w]hen a state properly invokes our jurisdiction to seek redress for a wrong perpetrated against it by a sister State, neither the measure of damages that we ultimately determine to be proper nor our method for calculating those damages can retrospectively negate our jurisdiction"), *Maryland* v. *Louisiana*, 451 U.S. at 737 (holding that the State was not a nominal party, because it was a consumer of natural gas subject to the other State's tax and the injury alleged "affect[ed] the general population of a State in a substantial way"), *Oklahoma ex rel. Johnson* v. *Cook*, 304 U.S. 387, 394 (1938) (holding that the State was a nominal party when it assumed title to assets of a bank's creditors in order to represent their interests against another State). The plaintiff States here represent their own contract interests and the interests of the general population in enforcing the Compact

> *the financial commitments of all party states to the Commission*, and c. Shall be paid to the Commission. [Opp. App. 15a-16a (emphasis supplied).]

Thus, the Compact expressly provides that the funds resulting from the levy represent "the financial commitments of all party States to the Commission." *Id.* at 16a. Moreover, each State has a direct interest in recouping that money in order to address the need for long-term access to alternative disposal facilities in light of North Carolina's failure to provide any.

North Carolina also contends that "the continued presence of the Commission as a named plaintiff and the nature of the relief sought" demonstrates that the States are only nominal parties. Opp. 14. This contention, too, is obviously wrong. "[P]rovided at least one state is on each side of the controversy, the presence of non-state parties, even indispensable parties, does not affect the exclusive jurisdiction of the Supreme Court." Stern et al., *Supreme Court Practice* 475 (6th ed. 1986) (citing *Arizona* v. *California*, 373 U.S. 546, 564 (1963) (allowing Indian tribes to intervene in original action)); *Maryland* v. *Louisiana*, 451 U.S. at 735-44 & n.21 ("it is not unusual to permit intervention of private parties in original actions").[2]

The States and the Commission each have direct interests. The interest of the latter does not diminish the interest of the former. This Court should exercise original jurisdiction here.

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[2] *See also Texas* v. *Louisiana*, 416 U.S. 965 (1974) (permitting a Texas municipality to intervene in a boundary dispute between states that affected its borders); *Oklahoma* v. *Texas*, 258 U.S. 574, 581 (1922) (allowing private parties to intervene in boundary dispute that affected them). For similar reasons, it is irrelevant that two party States, for unspecified reasons of their own, elected not to be plaintiffs here. Because four member States are plaintiffs and all member States authorized the Commission to be a plaintiff, the other States are not necessary parties.

2. The Nature Of The Case Strongly Supports The Exercise Of Original Jurisdiction. Two factors determine whether the Court will exercise its original jurisdiction: "'the nature of the interest of the complaining State,' focusing on the 'seriousness and dignity of the claim'" and the "availability of an alternative forum in which the issue tendered can be resolved." *Mississippi* v. *Louisiana*, 506 U.S. 73, 77 (1992) (citation omitted). Both considerations support jurisdiction here.

a. North Carolina contends that this dispute is unworthy of the Court's attention because it seeks money damages and does not implicate federal questions of importance to states as sovereigns. It could not be more wrong on both counts.

The issues presented here are federal questions involving the interpretation and enforcement of an interstate compact, a "law of the United States." *Cuyler* v. *Adams*, 449 U.S. 433, 438 (1981). "The legal consequences which flow from the formal participation in a compact consented to by Congress is a federal question for this Court." *State ex rel. Dyer* v. *Sims*, 341 U.S. 22, 35 (1951) (Jackson, J., concurring). Like other interstate compacts, this Compact is a unique vehicle addressing an issue of regional and national importance. See *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 278-79 (1959) (the Court "must treat the compact as a living interstate agreement which performs high functions in our federalism"); *Dyer*, 341 U.S. at 27 (compacts are responsive to the "growing interdependence of regional interests, calling for regional adjustments").

Interstate compacts, such as this one, are important components of the federal system; and their enforcement by this Court is necessary to their actual and perceived effectiveness. Review of the issues presented in this case is doubly necessary, because it directly implicates not only the willingness of this Court to act as a neutral arbiter among individual states, but also the ability of member states to enforce compacts against states who seek to withdraw from

compacts to avoid the consequences of the breach of their legal obligations thereunder.

The fact that the States seek compensatory damages does not detract from the important federal questions and policies implicated here. As set forth *supra*, this Court routinely exercises its original jurisdiction to interpret and enforce compacts. It has also done so in cases involving interstate disputes over contractual and other monetary obligations. See, *e.g.*, *Maryland* v. *Louisiana*, 451 U.S. at 735-38 (granting original jurisdiction to decide the validity of a tax on natural gas uses); *Kentucky* v. *Indiana*, 281 U.S. 163, 177-78 (1930) (granting original jurisdiction in a dispute regarding a contract to build a bridge between two states); *South Dakota* v. *North Carolina*, 192 U.S. 286, 312 (1904) (granting original jurisdiction in a "claim for money due on a written promise to pay"). Indeed, this Court exercises jurisdiction in "controversies arising upon pecuniary demands . . . just as in those for the prevention of the flow of polluted water from one State along the borders of another State." *Virginia* v. *West Virginia*, 206 U.S. 290, 319 (1907).

Finally, although North Carolina scoffs at the public health and safety concerns here, those concerns unquestionably increase the importance of the federal issues presented. The Compact was enacted by Congress for the express purpose of "promot[ing] the health and safety of the region." Compact, Art. 1, 99 Stat. at 1872.[3] Surely states are not required to wait until the danger to public health and safety is immediate and requires injunctive relief to invoke this Court's original jurisdiction. See *Missouri* v. *Illinois*, 180 U.S. 208, 241 (1901) (where "the health and comfort of the inhabitants of a State are threatened," the State must be allowed a remedy). Equally to the point, it is for Congress, not North Carolina, to

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[3] Tr. at 13 (Bill of Complaint App. B 24a) (the Compact faces "a prospect of numerous facilities within our states either storing waste indefinitely or terminating those operations which utilize radioactive material due to lack of disposal facility").

determine whether the issue of low-level radioactive waste disposal is an important and urgent issue of public safety and health – and this they did.

b. There is no pending federal or state court litigation to resolve this dispute; nor is there any alternative forum for its resolution. This Court has exclusive original jurisdiction over actions among states. North Carolina ignores that the member States cannot have their dispute about the interpretation and enforcement of the Compact resolved other than in this Court.

The Commission's filing of a federal court action against North Carolina is also problematic. If the Commission is not a state for this purpose, as North Carolina and the United States assert, the Eleventh Amendment is an obvious hurdle. *Alden* v. *Maine*, 527 U.S. 706, 728 (1999). The only forum with undisputed federal jurisdiction is this Court.

Nor are North Carolina's courts an adequate alternative. This Court has often noted the importance of an impartial federal tribunal in suits between states, see Mot. 26-28, and has never required a state to enforce an interstate compact against another state in the latter's courts. While this Court has deemed a federal district court an adequate alternative forum, *e.g.*, *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 108 (1972), it has only once expressly refused to exercise its original jurisdiction in a controversy between states based on the availability of a state court forum.[4]

In *Arizona* v. *New Mexico*, 425 U.S. 794 (1976), relied on by North Carolina, the Court declined to exercise jurisdiction over a challenge to a discriminatory energy tax. But, as this Court made clear, it did so because there was an ongoing state court action presenting the same issues in which Arizona was

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[4] Leave to file a bill of complaint was denied without opinion in *California* v. *West Virginia*, 454 U.S. 1027 (1981), a case involving breach of a contract to play a college football game. That denial appears to rest on the nature of the claim.

represented and because Arizona had not suffered any harm. See *Maryland* v. *Louisiana*, 451 U.S. at 742-44. Moreover, in the subsequent case of *Wyoming* v. *Oklahoma*, 502 U.S. 437, 451-54 (1992), the Court exercised its jurisdiction despite the availability of a state forum because no action had commenced in the state forum. In addition, in *Maryland* v. *Louisiana*, 451 U.S. at 742-44, the Court exercised its original jurisdiction *despite* the existence of an ongoing action because the State was not represented in that action and because the State's interests had been harmed. Cf. *California* v. *Texas*, 457 U.S. 164 (1982) (per curiam) (exercising original jurisdiction due to unavailability of federal district court forum without considering state court fora). The Court has been deeply reluctant to deem a state court an adequate forum for the resolution of disputes among states involving federal law.[5]

Finally, the inadequacy of the North Carolina courts is apparent for yet another dispositive reason. North Carolina has not expressly waived its right to sovereign immunity in a suit to enforce the Compact in its own courts, see Opp. 21-24, despite invitations to do so. The North Carolina courts have not addressed whether the State is immune from a suit to enforce an interstate compact. Compare *Smith* v. *North Carolina*, 222 S.E.2d 412, 423-24 (N.C. 1976) (holding that sovereign immunity does not bar a lawsuit against the State by one of its employees for breach of contract), with *North Carolina Dep't of Transp.* v. *Davenport*, 432 S.E.2d 303, 305 (N.C. 1988) (holding that North Carolina's sovereign immunity is absolute and unqualified unless expressly waived). It is perfectly clear, however, that neither the

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[5] The other cases relied on by North Carolina are entirely inapt. *Wyandotte Chemicals Corp.*, 401 U.S. at 494, did not involve two states, but rather a State and private parties. Similarly, in *Massachusetts* v. *Missouri*, 308 U.S. 1, 17-19 (1939), the Court found that the putative controversy between two States was non-justiciable and that the real controversy was between a State and nonresident citizens.

Commission nor the plaintiff States could "obtain execution to enforce the judgment" if one were rendered. *Smith*, 222 S.E.2d at 424. Instead, "[s]atisfaction w[ould] depend upon the manner in which the General Assembly discharges its constitutional duties." *Id.* On this basis alone, the North Carolina courts are not an adequate alternative forum for the resolution of this dispute among sovereign States.

"[N]o State should be compelled to resort to the tribunals of other States for redress." *Wyandotte Chems. Corp.*, 401 U.S. at 500. This Court should exercise original jurisdiction here.

3. The Imposition Of Sanctions Was Fully Warranted. North Carolina distorts the plain meaning of the Compact, arguing that it can take $80 million, breach the Compact, and avoid sanctions by withdrawing. Its interpretation makes a mockery of this Compact and all others.

Contrary to North Carolina (Opp. 25-26), the plain language of the Compact explicitly addresses a member State's continuing obligations despite withdrawal or any other attempt to evade sanctions. It provides that "[a]ny party state which fails to comply with the provisions of this compact or to fulfill the obligations incurred by becoming a party state to this compact may be subject to sanctions by the Commission." Compact, Art. 7(F), 99 Stat. at 1879. Critically, the Compact expressly states that the rights and obligations of party States do not terminate immediately, but rather upon "the effective date of the sanction or as provided in the resolution of the Commission imposing the sanction." *Id.* The plaintiff States do not contend that North Carolina's obligations continue "indefinitely," Opp. 26 – only until North Carolina satisfies the judgment of sanction.[6]

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[6] The plain language of the contract is consistent with the federal common law. Where a contract provides a dispute resolution process, that process governs all disputes arising out of the contract, even if the contract has expired. *See, e.g., Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 196-98 (1991); *Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l,*

North Carolina's further factual contention that it has acted in good faith is belied by the facts alleged. North Carolina claims that it was not responsible for funding the disposal site, see Opp. 6, but the Compact expressly provides that the Commission is not responsible and that the member States share the funding burden by rotating responsibility for hosting a disposal site, see Mot. 5-6. North Carolina also claims it "had no option but to discontinue site development activities," Opp. 10, due to a shortage of funds from the Commission. In truth, the Commission and waste generators offered North Carolina an alternative plan to finish the project, which it declined and refused to offer any alternative of its own, plainly not acts of good faith. See Mot. 14-15. Further, it refused to bring itself into compliance, defend its actions at the sanction proceeding, or pay the sanction unanimously-imposed by the other member States.[7]

Plaintiffs seek enforcement of a sanction order issued pursuant to the Compact. The principal legal issues are whether under the Compact the Commission acted within its jurisdiction in imposing a sanction on North Carolina and whether that order can be enforced. These are federal law issues of interstate compact interpretation and enforcement that this Court is uniquely competent to decide under our constitutional plan for resolving disputes among sovereign states.

CONCLUSION

The Court should grant Plaintiffs' motion for leave to file the Complaint.

Inc., 1 F.3d 639, 643 (7th Cir. 1993). *A fortiori*, a party that unilaterally withdraws from a contract is subject to the contract's dispute resolution process for disputes arising under the contract.

[7] North Carolina attempts to justify its own misconduct by claiming that South Carolina violated the Compact when it finally withdrew from the Compact in 1995. Opp. 8. South Carolina, in fact, gave four years notice before acting and, accordingly, did not violate the Compact. *See* Mot. 8.

Respectfully submitted,

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